



1 submitted under Rule 33; or . . . a party fails to produce documents or fails to respond that inspection  
2 will be permitted – or fails to permit inspection – as requested under Rule 34.” Fed. R. Civ. P.  
3 37(a)(3)(B).

4 **A. Scope of Discovery and Requests**

5 The scope and limitations of discovery are set forth by the Federal Rules of Civil Procedure  
6 and Evidence. The scope of discovery of a Rule 45 subpoena is the same as with a production request  
7 under Rule 34, which is guided by Rule 26. Fed. R. Civ. P. 26(b) states:

8 Unless otherwise limited by court order, parties may obtain discovery regarding any  
9 nonprivileged matter that is relevant to any party’s claim or defense – including the  
10 existence, description, nature, custody, condition, and location of any documents or other  
11 tangible things. . . . For good cause, the court may order discovery of any matter relevant to  
the subject matter involved in the accident. Relevant information need not be admissible  
at the trial if the discovery appears reasonably calculated to lead to the discovery of  
admissible evidence.

12 Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that  
13 is of consequence to the determination of the action more probable or less probable than it would be  
14 without the evidence.” Fed. R. Evid. 401. Relevancy to a subject matter is interpreted “broadly to  
15 encompass any matter that bears on, or that reasonably could lead to other matter that could bear on,  
16 any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

17 1. Requests for Production of Documents

18 A party may request documents “in the responding party’s possession, custody, or control.”  
19 Fed. R. Civ. P. 34(a)(1). Similarly, a party may serve a request “to permit entry onto designated land  
20 or other property possessed or controlled by the responding party, so that the requesting party may  
21 inspect, measure, survey, photograph, test, or sample the property . . .” Fed. R. Civ. P. 34(a)(2). A  
22 request is adequate if it describes items with “reasonable particularity;” specifies a reasonable time,  
23 place, and manner for the inspection; and specifies the form or forms in which electronic information  
24 can be produced. Fed. R. Civ. P. 34(b). Thus, a request is sufficiently clear if it “places the party  
25 upon ‘reasonable notice of what is called for and what is not.’” *Kidwiler v. Progressive Paloverde Ins.*  
26 *Co.*, 192 F.R.D. 193, 202 (N.D. W. Va. 2000) (quoting *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D.  
27 408, 412 (M.D.N.C. 1992)); *see also* Schwarzer, Tashima & Wagstaffe, *California Practice Guide:*  
28 *Federal Civil Procedure Before Trial* (Rev. #1 2011) Discovery, para. 11:1886 (“the apparent test is

1 whether a respondent of average intelligence would know what items to produce”).

2 The responding party must respond in writing and is obliged to produce all specified relevant  
3 and non-privileged documents, tangible things, or electronically stored information in its “possession,  
4 custody, or control” on the date specified. Fed. R. Civ. P. 34(a). Actual possession, custody or control  
5 is not required. “A party may be ordered to produce a document in the possession of a non-party  
6 entity if that party has a legal right to obtain the document or has control over the entity who is in  
7 possession of the document.” *Soto v. City of Concord*, 162 F.R.D. 603, 620 (N.D. Cal. 1995). Such  
8 documents include documents under the control of the party’s attorney. *Meeks v. Parson*, , 2009 WL  
9 3303718 (E.D. Cal. Sept. 18, 2009) (involving a subpoena to the CDCR); *Axler v. Scientific Ecology*  
10 *Group, Inc.*, 196 F.R.D. 210, 212 (D. Mass. 2000) (a “party must produce otherwise discoverable  
11 documents that are in his attorneys’ possession, custody or control”).

12 In the alternative, a party may state an objection to a request, including the reasons. Fed. R.  
13 Civ. P. 34(b)(2)(A)-(B). When a party resists discovery, he “has the burden to show that discovery  
14 should not be allowed, and has the burden of clarifying, explaining, and supporting its objections.”  
15 *Oakes v. Halvorsen Marine Ltd.*, 189 F.R.D 281, 283 (C.D. Cal. 1998) (citing *Nestle Food Corp. v.*  
16 *Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 104 (D.N.J. 1990)). Boilerplate objections to a request for a  
17 production are not sufficient. *Burlington Northern & Santa Fe Ry. v. United States Dist. Court*, 408  
18 F.3d 1142, 1149 (9th Cir. 2005).

19 If a party “fails to respond that inspection will be permitted – or fails to permit inspection – as  
20 requested under Rule 34,” the propounding party may make a motion to compel production of the  
21 documents. Fed. R. Civ. P. 37(a)(3)(B)(iv). Further, “an evasive or incomplete disclosure, answer, or  
22 response must be treated as a failure to disclose, answer or respond.” Fed. R. Civ. P. 37(a)(4). “The  
23 moving party bears the burden of demonstrating ‘actual and substantial prejudice’ from the denial of  
24 discovery.” *Hasan v. Johnson*, 2012 WL 569370 at \*2 (E.D. Cal. Apr. 9, 2012) (citing *Hallet v.*  
25 *Morgan*, 296 F.3d 732, 751 (9th Cir. 2002)).

## 26 2. Request to Compel Testimony

27 Pursuant to Rule 30 of the Federal Rules of Civil Procedure, “[a] party may, by oral questions,  
28 depose any person, including a party, without leave of court” by serving proper notice. The Court is

1 authorized to issue sanctions for a party's failure to appear for a deposition under Rule 37(d), which  
2 provides in relevant part: "if a party... fails, after being served with proper notice, to appear for that  
3 person's deposition... [s]sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(iv)."  
4 Such orders include directing the striking pleadings, issuing terminating sanctions, or other "just  
5 orders." Fed. R. Civ. P. 37(b)(2)(A)

### 6 3. Subpoenas for Deposition

7 Under Rule 45 of the Federal Rules of Civil Procedure, a subpoena may be issued requiring a  
8 nonparty to attend a deposition "within 100 miles of where the person resides, is employed, or regularly  
9 transacts business in person." Fed. R. Civ. P. 45(c)(1)(A). In addition, any party may serve a subpoena  
10 that commands a non-party "to produce documents, electronically stored information, or tangible things  
11 . . ." Fed. R. Civ. P. 45(a)(1)(C). Subpoenas are subject to the relevance requirements of Rule 26(b),  
12 and therefore may command the production of documents which are "nonprivileged [and] . . . relevant  
13 to a party's claim or defense." Fed. R. Civ. P. 26(b)(1).

14 Once a nonparty has been properly served with a Rule 45 subpoena, the nonparty "may (1)  
15 comply with the subpoena, (2) serve an objection on the requesting party in accordance with Civil Rule  
16 45(c)(2)(B), or (3) move to quash or modify the subpoena in accordance with Civil Rule 45(c)(3)." *In*  
17 *re Plise*, 506 B.R. 870, 878 (2014) (citation omitted). If a nonparty serves a written objection to the  
18 subpoena, the party seeking the deposition must obtain a court order that directs the nonparty to comply  
19 with the subpoena. *Id.* (citations omitted). Even if a nonparty does not serve a written objection or  
20 move to quash, "the more prudent practice for the court is to issue such an order before entertaining a  
21 motion for contempt." *United States Sec. Exch. Comm'n. v. Hyatt*, 621 F.3d 687, 694 (7th Cir. 2010)  
22 (citation omitted).

### 23 **B. Discussion and Analysis**

24 Plaintiff alleges that the discovery at issue involves the following: (1) Subpoena to CDCR  
25 dated May 29, 2019; (2) Inspection Demand, Set Four, dated July 11, 2019 (Items 8-10); (3) Subpoena  
26 to CDCR dated September 13, 2019; (4) Deposition Subpoena to Edgar Clark, M.D., with witness fee;  
27 and (5) Notice of Deposition of Stewart Lonky, M.D., with documents demands.

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1           1. Subpoena to CDCR dated May 29, 2019

2           The Subpoena dated May 29, 2019 requested the following:

3           Item No. 1:

4           All DOCUMENTS in their NATIVE FORM CONCERNING medical records, beginning  
5           August 1, 2015, to his discharge in December 2018, limited to the treatment of Mark Vaughn,  
6           former CDCR No.: T72743, only for the effect of inhalation of Dakin’s solution occurring on  
7           or about August 5, 2015, including chemically induced asthma and/or chronic obstructive  
8           pulmonary disease, or any other diagnosis related to inhalation of Dakin’s solution.

9           Item No. 2:

10           All DOCUMENTS in their NATIVE FORM CONCERNING all medical expenses paid by  
11           YOU for the treatment of Mark Vaughn, former CDCR No.: T72743, related to his pulmonary  
12           care beginning August 1, 2015, to his discharge in December 2018. The medical treatment  
13           expenses include, but are not limited to, those for emergency acute care, transportation,  
14           hospitalizations, treatment in clinical settings, physician consults, breathing treatments,  
15           medications, supplies, oxygen, and oxygen generators.

16           Item No. 3:

17           All DOCUMENTS in their NATIVE FORM CONCERNING inmate requests for medical  
18           services, including CDCR Form 7362s, submitted by Mark Vaughn, former CDCR No.:  
19           T72743, beginning August 1, 2015, to his discharge in December 2018.

20           According to Plaintiff, the subpoena dated May 29, 2019, was served on May 30, 2019, on  
21           CDCR. (Doc. 35-1 at 11.) Plaintiff reports that no response was served either stating an objection or  
22           stating that the documents would be produced. Id. Plaintiff asserts that objections have been waived as  
23           untimely. Id.

24           Defendant reports that counsel for Defendant was first made aware of this subpoena in  
25           November 2019. (Doc. 35-1 at 18.) According to Defendant, it was not served on counsel for  
26           Defendant, nor was it provided to counsel for Defendant until November 4, 2019. Id. Defendant also  
27           asserts that a proof of service has not been provided to Defense counsel as of November 26, 2019. Id.  
28           Defendant also contends that it appears that Plaintiff’s counsel is in possession of all documents  
29           responsive to the subpoena. Id. Defendant states that if Plaintiff is only looking for a “formal  
30           response,” Defense counsel will provide a response upon receipt of a proof of service of the subpoena.  
31           Id. Plaintiff replies that Plaintiff has produced evidence that service was performed on Linda Stark.  
32           (Doc. 35-1 at 18-19.)

33                           **a.       Item No. 1**

34           Regarding Item No. 1, Defendant contends that Plaintiff’s counsel has been provided all of  
35           Plaintiff’s medical records from 2015 through Plaintiff’s parole in 2018. (Doc. 35-1 at 19.)

1 Defendant's position is that Plaintiff's treatment for the inhalation of Dakin's solution was concluded  
2 by August 13, 2018. Id. Plaintiff alleges that all of his subsequent treatment was related to the incident  
3 of August 5, 2015; thus, according to Defendant, there is a clear dispute as to which records relate to  
4 the incident of August 5, 2015. Id. Defendant contends that neither Defendant nor CDCR is in  
5 possession of any additional medical records, and that there is nothing left for CDCR to produce in  
6 response to Item No. 1. Id.

7         According to the Defendant, neither the Defendant nor CDCR is in possession of any  
8 additional medical records that have not yet been produced. To the extent there are additional medical  
9 records the Plaintiff seeks to obtain that he has not yet obtained, Plaintiff must make such a request to  
10 the appropriate providers. The obligation to request such additional medical records lies with the  
11 Plaintiff.

12         On the other hand, the CDCR is not a party to this case and the plaintiff has failed to  
13 demonstrate that he served notice of this motion and the motion on the CDCR. Thus, to the extent this  
14 motion seeks to compel the CDCR to act, the motion is **DENIED**. Consequently, Plaintiff's request to  
15 compel response to Item No. 1 of Subpoena to CDCR dated May 29, 2019 is **DENIED**.

16                     ***b.         Item No. 2***

17         Regarding Item No. 2, Defendant reports that Plaintiff's counsel has made a similar request in  
18 the form of a request for production of documents on Defendant. (Doc. 35-1 at 20.) According to  
19 Defendant, Plaintiff's counsel has been advised that CDCR does not keep records of the costs  
20 associated with medical services or supplies provided to the inmates by CDCR, and records are kept of  
21 the billing records associated with medical care provided by outside medical providers. Id. Defendant  
22 reports that these records were initially produced on a CD with the response to September 13, 2019  
23 subpoena. Id. Defendant states that in November of 2019, Plaintiff's counsel suggested that he had not  
24 received the billing records, so Defense counsel sent another copy of the records by e-mail on  
25 November 13, 2019. Id. Defendant therefore contends that all of the billing records have been  
26 produced, and there is nothing left for CDCR to produce in response to Item No. 2. Id.

27         Plaintiff argues that a response to a subpoena does not comply with Federal Rules of Civil  
28 Procedure Rule 45 when it first appears in opposition to a motion to compel. (Doc. 35-1 at 21.)

1 According to Plaintiff, after Plaintiff originally served the demand, the response was that a diligent  
2 search was conducted and no such records existed. Id. Plaintiff reports that on May 13, 2019, Plaintiff  
3 disputed the claim and asked for an additional effort to locate the records. Id. According to Plaintiff, in  
4 response, Defense counsel stated that the diligent search was limited to asking a litigation coordinator.  
5 Id. Plaintiff states that by May 29, 2019, Plaintiff's counsel gave notice that a motion to compel would  
6 be filed over this issue. Id. Plaintiff reports that Defense counsel claimed that the Inspection Demand  
7 was not enforceable due to service issues in spite of counsel's offers, reassurances, and  
8 acknowledgements otherwise. Id. According to Plaintiff, the next day, Plaintiff served this subpoena,  
9 and the day after, May 31, 2019, Defense counsel stated that, in fact, billing records did exist, and that  
10 they would be served by e-mail the next week. Id. Plaintiff reports that Defense counsel then  
11 represented that the records were being mailed on a CD, however, neither the records nor the CD were  
12 provided. Id. According to Plaintiff, on November 7, 2019, after numerous threats that a motion to  
13 compel would be filed, Plaintiff e-mailed notice to Defense counsel that this motion would be drafted,  
14 and that any responses served after that date would be considered as produced to avoid a Court order.  
15 Id. Plaintiff reports that on November 13, 2019, Defense counsel e-mailed the billing records  
16 requested on April 1, 2019.

17 According to the parties, it appears that Defendant has produced all of the billing records to  
18 Plaintiff. Defendant contends there is nothing left for CDCR to produce in response to this request.  
19 Accordingly, because Plaintiff has received the requested documents, Plaintiff's request to compel  
20 response to Item No. 2 of Subpoena to CDCR dated May 29, 2019 is **DENIED**.

21 *c. Item No. 3*

22 Regarding Item No. 3, Defendant alleges that Plaintiff's requests for medical services are all  
23 included in Plaintiff's medical records, and Plaintiff's counsel is in possession of all of Plaintiff's  
24 medical records from 2015 through Plaintiff's parole in 2018. (Doc. 35-1 at 22.) Thus, Defendant  
25 contends, there is nothing left for CDCR to produce in response to Item No. 3. Id. Plaintiff again  
26 argues that a response to a subpoena does not comply with Federal Rules of Civil Procedure Rule 45  
27 when it first appears in opposition to a motion to compel. Id.

28 It appears that Defendant has produced the documents responsive to Item No. 3. According to

1 Defendant, there is nothing left for CDCR to produce in response to Item No. 3. Thus, Plaintiff's  
2 request to compel response to Item No. 3 of Subpoena to CDCR dated May 29, 2019 is **DENIED**.

3 2. Inspection Demand, Set Four, dated July 11, 2019 (Items 8-10)

4 The Inspection Demand, Set Four, dated July 11, 2019 (Items 8-10) requested the following:

5 Inspection Demand No. 8: "CONCERNING" means relating to, demonstrating, supporting,  
6 proving, elaborating, corroborating or completing. All DOCUMENTS CONCERNING the  
7 placement of Plaintiff in a medical clinical setting, including Correctional Treatment Centers  
8 and Outpatient Housing Units, by any CDCR unit, department, or employee, including the  
9 Health Care Placement Oversight Program (HCPOP) and/or similar entity by any other name  
10 that manages the allocation of CDCR health care resources.

11 Response: Responding Party objects to this request on the grounds that it is vague and  
12 ambiguous. Responding Party does not know what Plaintiff means by "placement of Plaintiff  
13 in a medical clinical setting." Subject to and without waiving said objection, Responding Party  
14 responds as follows: Based upon Plaintiff's definition of the term "CONCERNING," all of  
15 Plaintiff's medical records "concern" Plaintiff's placement in a medical clinical setting.  
16 Responding Party is not in possession of any additional records which might be produced in  
17 this regard.

18 Inspection Demand No. 9: All DOCUMENTS CONCERNING the review of the Medical  
19 Error Report CONCERNING the delivery of medical supplies by Defendant to Plaintiff as  
20 alleged in this lawsuit, including the Supervisory File for Defendant, all Form 1123, all letters  
21 of instruction, and all adverse actions as described by Laura Schaper at her deposition in this  
22 case.

23 Inspection Demand No. 10: All DOCUMENTS CONCERNING Defendant's training file.

24 According to Defendant, with regard to Inspection Demand, Set Four, the parties dispute which  
25 version of the demand was served. (Doc. 35-1 at 22.) Defense counsel received the Document Demand  
26 which includes Inspection Demand Nos. 6-8 from Deputy Attorney General John Bridges who  
27 attended the depositions in July of 2019. (Doc. 35-1 at 22-23.) Defendant reports that is the only  
28 version provided to Defense counsel at that time. (Doc. 35-1 at 23.) According to Mr. Bridges, that is  
the last version that was provided to him. Id. Defendant states that he served responses on August 9,  
2019. Id. According to Defendant, more than three weeks later, on Saturday, August 31, Plaintiff's  
counsel sent the version with Inspection Demands 9 and 10 by e-mail. Id. Defendant reports that was  
the first time Defense counsel saw Inspection Demands 9 and 10. Id. Plaintiff contends that it does not  
matter whether Defense counsel ever saw Items 9 and 10, and states that they were served and Mr.  
Bridges mishandled them. Id. Plaintiff reports that Plaintiff's counsel provided an e-mail thread from  
the court reporter's office making clear that Inspection Demand Set Four, Items 6 through 10, were



1 printed at the office. Id. Plaintiff states that a proof of personal service was delivered to Defense  
2 counsel. Id.

3 *a. Item No. 8*

4 Item 8 requested health care utilization records related to the placement of Plaintiff in a clinical  
5 setting for three months. According to Plaintiff, Defendant objected on the grounds that “placement of  
6 Plaintiff in a clinical setting” is vague and ambiguous without explaining how. (Doc. 35-1 at 12.)  
7 Plaintiff contends that Defendant’s objection is boilerplate and without merit. Id. Plaintiff asserts that  
8 the substantive response is evasive and dissembling by claiming that all medical records “concern”  
9 placement in a clinical setting. Id. According to Defendant, Plaintiff’s counsel is in possession of all of  
10 Plaintiff’s medical records from 2015 through Plaintiff’s parole in 2018, and Defense counsel is  
11 unable to determine what else Plaintiff’s counsel is seeking. (Doc. 35-1 at 23.) Plaintiff replies that the  
12 request is not for medical records. (Doc. 35-1 at 24.)

13 It appears here that Defendant has provided Plaintiff with the medical records that would be  
14 responsive to this request. If the documents produced were not those that Plaintiff was seeking, he had  
15 the opportunity to clarify the request. The Court agrees with Defendant’s contention that the request is  
16 vague and ambiguous, which is demonstrated by Plaintiff’s reply here, only asserting that the request  
17 it not for medical records, but failing to provide any further clarification as to what exactly is being  
18 requested. Accordingly, Plaintiff’s request to compel response to Inspection Demand, Set Four, Item  
19 No. 8 is **DENIED**.

20 *b. Item No. 9*

21 Item 9 requested information about how CDCR reviewed Defendant’s actions when she  
22 dispensed the wrong medication to Plaintiff. According to Plaintiff, no response was served either  
23 stating an objection or stating that the documents would be produced. (Doc. 35-1 at 12.) Plaintiff  
24 argues that objections have been waived as untimely. Id.

25 Defense counsel reports that he requested a copy of the records requested, including the  
26 Medical Error Report, letters of instruction, and the Supervisory File for Nurse Duran. (Doc. 35-1 at  
27 24.) Defendant reports that the litigation coordinator sent Defense counsel a number of documents  
28 which were identified as the Supervisory File for Nurse Duran. Id. Defense counsel sent all of those

1 documents to Plaintiff's counsel. Id. Defense counsel contends that he specifically followed up with  
2 the litigation coordinator to inquire as to the existence of a Medical Error Report relating to the bleach  
3 exposure on August 5, 2015, and the litigation coordinator confirmed that they were unable to locate  
4 any such record. Id. Defendant states that it is the practice of attorneys with the Attorney General's  
5 Office to rely upon experienced litigation coordinators to navigate through institutional operations and  
6 work with institutional personnel to seek and produce records. (Doc. 35-1 at 24-25.) Defendant further  
7 describes that when a litigation coordinator advises counsel that there are no records, counsel will rely  
8 on such representations unless there is some additional information to suggest that responsive records  
9 do, in fact, exist. (Doc. 35-1 at 25.) Defense counsel states it is relying upon the representations of the  
10 litigation coordinator's determination that further responsive records do not exist. Id. Defense counsel  
11 reports that he specifically followed up with the litigation coordinator to inquire as to the existence of  
12 specific records sought by Plaintiff's counsel. Id. Defendant contends that there is nothing left for  
13 CDCR to produce. Id. Plaintiff replies that litigation coordinators are not the persons through whom to  
14 obtain these records, and they should be obtained directly from personnel administrators. Id.

15 The Court finds that Defendant's reliance on the representation of the litigation coordinator is a  
16 normal practice and is reasonable. The CDCR is an entity and can only act through its employees.  
17 After receiving documents from the litigation coordinator, Defense counsel also asserts that he  
18 followed up with the litigation coordinator regarding this specific request at issue, and the litigation  
19 coordinator confirmed that they were unable to locate any such record. Relying upon the  
20 representations of the litigation coordinator, Defense counsel has produced the responsive records that  
21 were obtained. Plaintiff claims that litigation coordinators are not the persons through whom to obtain  
22 these records, however, it is the Defendant's normal practice. Moreover, any responsive records that  
23 were obtained have been produced by the Defendant. Thus, Plaintiff's request to compel response to  
24 Inspection Demand, Set Four, Item No. 9 is **DENIED**.

25 *c. Item No. 10*

26 Item 10 requested Defendant's training file. According to Plaintiff, no response was served  
27 either stating an objection or stating that the documents would be produced. (Doc. 35-1 at 13.)  
28 Plaintiff again argues that objections have been waived as untimely. Id. Plaintiff asserts that

1 Defendant's training file includes documentation of how the medication error was addressed. Id.

2 Defense counsel states that he requested a copy of the Training File for Nurse Duran, the  
3 litigation coordinator sent Defense counsel a number of documents which were identified as the  
4 Training File for Nurse Duran, and Defense counsel sent all of those documents to Plaintiff's counsel.  
5 (Doc. 35-1 at 25.) Defendant contends that it is undisputed that CDCR policy required nurse Duran to  
6 check the labels of medications and supplies to ensure that the right medications were provided, and it  
7 is undisputed that Nurse Duran was aware of this policy. (Doc. 35-1 at 26.) Defendant argues that it is  
8 undisputed that Nurse Duran failed to comply with this policy on the occasion at issue. Id. Defendant  
9 states that it is not clear what additional policies or training records Plaintiff's counsel is seeking. Id.  
10 Plaintiff replies that Plaintiff raised legitimate questions about this production that Defendant has  
11 failed to address. Id.

12 Defendant states that he sent to Plaintiff all the documents that he received from the litigation  
13 coordinator which were identified as the Training File for Nurse Duran. As Defendant contends, it is  
14 not clear what additional policies or training records Plaintiff's counsel is seeking. There does not  
15 appear to be any reason to think that Defendant has not already produced all the responsive documents  
16 he has for this request. Therefore, Plaintiff's request to compel response to Inspection Demand, Set  
17 Four, Item No. 10 is **DENIED**.

18 3. Subpoena to CDCR dated September 13, 2019

19 The subpoena to CDCR dated September 13, 2019 includes Items 8 through 11. Items 8  
20 through 10 are identical to Items 8 through 10 from Inspection Demand, Set Four, addressed above.  
21 (Doc. 35-1 at 26.) Item No. 11 requested the following:

22 Item No. 11: All DOCUMENTS CONCERNING Operating Procedures (OP) at California  
23 State Prison - Corcoran.

24 Response: CDCR objects to this request on the grounds that it is vague and ambiguous. CDCR  
25 does not know what Plaintiff means by "Operating Procedures." CDCR further objects to this  
26 request on the grounds that it is irrelevant, overly broad, and unduly burdensome. Operating  
27 Procedures at Corcoran State Prison are included within numerous manuals and sources, some  
28 of which are thousands of pages in length. The vast majority of any operating procedures are  
not related to the subject matter of this case in any way. Subject to and without waiving said  
objections, CDCR responds as follows: Relevant policies and procedures were produced at the  
deposition of Ms. Schaper.

1 Plaintiff contends that the response is evasive by referring to the Receiver's Inmate Medical  
2 Services Policies and Procedures. (Doc. 35-1 at 15.) Defendant asserts that CDCR objected to this  
3 request on the grounds that it is irrelevant, overly broad, and unduly burdensome. (Doc. 35-1 at 26.)  
4 Defendant reports that Operating Procedures at Corcoran State Prison are included within numerous  
5 manuals and sources, some of which are thousands of pages in length. *Id.* According to Defendant, the  
6 vast majority of any operating procedures are not related to the subject matter of this case in any way,  
7 and the relevant policies and procedures were produced and discussed at the deposition of Ms.  
8 Schaper. (Doc. 35-1 at 26-27.) In reply, Plaintiff states that Ms. Schaper made clear that each  
9 institution has local policies. (Doc. 35-1 at 27.)

10 The Court agrees with Defendant's objections regarding this request. The request appears to be  
11 overly broad, requesting the operating procedures at California State Prison, Corcoran, which  
12 Defendant reports includes numerous manuals and sources, some of which are thousands of pages in  
13 length. Additionally, Defendant states that the vast majority of any operating procedures are not  
14 related to the subject matter of this case. Defendant also reports that he has already produced the  
15 relevant policies and procedures. Accordingly, Plaintiff's request to compel Item No. 11 of the  
16 subpoena to CDCR dated September 13, 2019 is **DENIED**.

17 4. Deposition Subpoena to Edgar Clark, M.D., with witness fee

18 Plaintiff states that he served a subpoena on Dr. Edgar Clark to take his deposition on July 11,  
19 2019 at 11:30 a.m. (Doc. 35-1 at 27.) According to Plaintiff's counsel, a witness fee of \$41.00 was  
20 tendered with the subpoena. *Id.* On July 10, 2019 at 1:45 p.m., less than 24 hours before the  
21 deposition, Plaintiff's counsel sent an e-mail to Defense counsel indicating that the deposition of Dr.  
22 Clark was being cancelled. *Id.* On July 15, 2019, Plaintiff's counsel sent an e-mail to Defense counsel  
23 requesting that the check for the witness fee be returned. *Id.* Plaintiff argues that no obligation to incur  
24 a witness fee arose, and no reason justifies retaining the fee. (Doc. 35-1 at 15.)

25 Defendant asserts that Dr. Clark is not a party to this case nor was he represented by Defense  
26 counsel at a deposition. (Doc. 35-1 at 27.) Nonetheless, Defendant reports that in an effort to assist  
27 Plaintiff's counsel, Defense counsel e-mailed Dr. Clark to inquire as to the status of the check. *Id.* Dr.  
28 Clark indicated that he did not receive the check. *Id.* Defense counsel did not receive the check. *Id.*

1 Defense counsel reports that he does not have any additional information about the status of the check  
2 or whether it was cashed. (Doc. 35-1 at 28.) Plaintiff contends that Defense counsel represents CDCR.  
3 Id. Plaintiff states that a check was tendered to CDCR, and the check for the witness fee was deposited  
4 by CDCR. Id.

5 As stated, the witness fee of \$41.00 was tendered with the subpoena served on Dr. Clark.  
6 Defendant clarifies that Dr. Clark is not a party to this case nor was he represented by Defense counsel  
7 at a deposition. The remedy here is with the witness. However, the plaintiff failed to give notice of this  
8 motion to Dr. Clark. The Court is not authorized to issue an order compelling Dr. Clark to return the  
9 witness fee without proper notice upon that person. Accordingly, Plaintiff's request that the Court  
10 order CDCR to reimburse Plaintiff for the fee is **DENIED**.

11 5. Notice of Deposition of Stewart Lonky, M.D., with documents demands

12 Plaintiff states that Items 10-13 were served on Defendant's expert witness, Dr. Lonky, without  
13 objection. (Doc. 35-1 at 15.) Plaintiff contends that no records were produced. Id. According to  
14 Plaintiff, Dr. Lonky testified at his deposition that he obtains expert witness cases through an agency  
15 named Exam Works. Id. Plaintiff states that with regard to Item 10, time spent, and Item 13,  
16 marketing, Dr. Lonky referred to Exam Works. Id. Plaintiff asserts that Item 11, list of prior cases, is  
17 required by Federal Rules of Civil Procedure 26(a)(2)(B)(v) as part of the expert designation process.  
18 (Doc. 35-1 at 15-16.) Plaintiff reports that the list was not provided when designated or at his  
19 deposition. (Doc. 35-1 at 16.) Plaintiff states that Item 12, record of income from expert work, is  
20 routinely requested from experts. Id. Plaintiff describes that the information allows a jury to consider  
21 income as a motive for testimony. Id.

22 According to Defendant, on October 28, 2019, Plaintiff's counsel e-mailed a copy of the  
23 Notice of Deposition of Dr. Lonky set for November 6, 2019. (Doc. 35-1 at 28.) On November 4,  
24 2019, Defense counsel sent an e-mail to Plaintiff's counsel advising him of the contents of Dr.  
25 Lonky's file, and providing a copy of the documents that were not already in the possession of  
26 Plaintiff's counsel. Id. Defendant reports that these documents included Dr. Lonky's billing records  
27 and handwritten notes. Id. Defense counsel advised Plaintiff's counsel that he was already in  
28 possession of the remaining records in Dr. Lonky's file, including the medical records, CV, fee

1 schedule, and Dr. Lonky's report with supporting articles. Id. According to Defendant, Plaintiff's  
2 counsel did not reply to the e-mail or otherwise express dissatisfaction with the document production  
3 until Dr. Lonky's deposition on November 6, 2019. Id. Defendant reports that during Dr. Lonky's  
4 deposition on November 6, 2019, Plaintiff's counsel requested a copy of Dr. Lonky's list of prior  
5 cases. Id. Dr. Lonky testified that he was not currently in possession of such a list. Id. Defense counsel  
6 indicated that he would work with Dr. Lonky and ExamWorks to ensure that such a list is produced,  
7 and Defense counsel states he is currently working with Dr. Lonky to develop such a list. (Doc. 35-1  
8 at 28-29.) According to Defendant, Dr. Lonky has produced his billing records associated with this  
9 case. (Doc. 35-1 at 29.) Defendant reports that Dr. Lonky is not in possession of a record documenting  
10 his income from expert work in the last ten years, and Dr. Lonky is not aware of any marketing  
11 materials associated with his expert services. Id. Plaintiff contends that the only way to obtain certain  
12 records in this case is to compel them, such as the production of billing records. Id. Plaintiff reports  
13 that it took seven months and this motion to obtain them, and Plaintiff cannot rely on Defense  
14 counsel's voluntary efforts. Id.

15 The disclosure of expert witnesses is governed by Rule 26(a) of the Federal Rules of  
16 Procedure. Parties must disclose the identity of each expert who will testify at trial. Fed. R. Civ. P.  
17 26(a)(2)(A). When a witness is "retained or specially employed to provide expert testimony in the  
18 case" the disclosure requirements are as follows:

- 19 (i) a complete statement of all opinions the witness will express and the basis and reasons for  
20 them;  
21 (ii) the facts or data considered by the witness in forming them;  
22 (iii) any exhibits that will be used to summarize or support them;  
23 (iv) the witness's qualifications, including a list of all publications authored in the previous 10  
24 years;  
25 (v) a list of all other cases in which, during the previous 4 years, the witness testified as an  
26 expert at trial or by deposition; and  
27 (vi) a statement of the compensation to be paid for the study and testimony in the case.

28 Fed. R. Civ. P. 26(a)(2)(B). Expert reports eliminate unfair surprise and conserve resources. *Elgas v.*  
*Colorado Belle Corp.*, 179 F.R.D. 296, 299 (D. Nev. 1998) (citation omitted). The test under Rule  
26(a)(2)(B) is "whether [the report is] sufficiently complete, detailed and in compliance with the Rules  
so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced." *Id.*

1 As Plaintiff cites, Rule 26(a)(2)(B)(v) of the Federal Rules of Procedure requires that a list of  
2 prior cases be disclosed as part of the expert reports. According to both parties, this list has not yet  
3 been disclosed. Accordingly, the Court **GRANTS** Plaintiff’s motion to compel production of these  
4 expert reports.

5 **II. Request for Sanctions**

6 Pursuant to Rule 37, “the court must require the party failing to act, the attorney advising that  
7 party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless  
8 the failure was substantially justified or other circumstances make an award of expenses unjust.” Fed.  
9 R. Civ. P. 37(d)(3).

10 Plaintiff contends that the Defendant failed to act in good faith. (Doc. 35-1 at 16.) Plaintiff  
11 reports that Defendant offered no excuse for a failure to provide a formal response to a subpoena  
12 served on CDCR, and instead CDCR offers its responses for the first time in opposition to this motion.  
13 Id. According to Plaintiff, Defendant refuses to acknowledge that records are being withheld, and  
14 some records were only produced after Plaintiff gave notice that this motion was being prepared. Id.  
15 Plaintiff seeks sanctions in the amount of \$3,750. Id.

16 On the other hand, Defendant contends that Plaintiff’s request for sanctions is not justified.  
17 (Doc. 35-1 at 29.) Defense counsel states that he has worked in good faith to locate and produce  
18 documents responsive to all of Plaintiff’s requests and subpoenas. Id. Defendant argues that Plaintiff’s  
19 requests have often been vague or overly broad. Id.

20 Defendant has shown his actions were substantially justified. It appears that, as Defense  
21 counsel alleges, he has worked in good faith to locate and produce documents responsive to Plaintiff’s  
22 requests and subpoenas. Accordingly, the Court finds that an award of expenses would be unjust.  
23 Plaintiff’s request for sanctions is **DENIED**.

24 **III. Conclusion and Order**

25 Based upon the foregoing, the Court **ORDERS**:

- 26 1. Plaintiff’s motion to compel (Doc. 35) is **DENIED** in all respects except as to the Notice of  
27 Deposition of Stewart Lonky, M.D., with documents demands. As to this request, the  
28 motion is **GRANTED**; and

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2. Plaintiff's request for sanctions is **DENIED**.

IT IS SO ORDERED.

Dated: December 27, 2019

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE